



**ADJUDICATION ORDER IN TERMS OF SECTIONS 53 AND 54 OF
COMMUNITY SCHEMES OMBUD SERVICE ACT 9 OF 2011**

Reference No: 0002061/GP/2017

In the matter between

ABDUL LATIEF JARDIEN

APPLICANT

and

DOLPHIN COVE BODY CORPORATE

RESPONDENT

ORDER

THE PARTIES

1. The Applicant is Abdul Latief Jardien the owner of unit 123, Dolphin Cove, Florida, Johannesburg, "the Applicant ." The Applicant represented himself at the adjudication.
2. The Respondent is the Dolphin Cove Body Corporate, a body corporate as contemplated in Section 2 of the Sectional Titles Schemes Management Act 8 of 2011 ("the Act,"), the ("Respondent or the body corporate.") The Respondent was represented by Albert Mashoko, the Chairperson of the Respondent, Lazarus Baloyi the Treasurer of the Respondent and Gavin Hope, a Trustee of the Respondent.

TYPE OF APPLICATION

3. The adjudication was held under the auspices of the Community Schemes Ombud Service (the Ombud) having been referred by the office of the Ombud for adjudication in terms of section 48 of the Community Schemes Ombud Service Act 9 of 2011 (the Act). This order is issued in terms of section 54 of the Act.

BACKGROUND

4. The Applicant lodged a complaint against the Dolphin Cove Body Corporate. The matter was set down for adjudication on 12 July 2018. A number of complaints were raised by the Applicant at the adjudication that do not form part of the complaint originally lodged by the Applicant, on 17 January 2018, with CSOS on the prescribed complaint form.
5. The order thus only deals with those complaints as formally lodged by the Applicant against the Respondent.
6. Accordingly, this is the order flowing out of the adjudication of the above matter.

ISSUE TO BE DECIDED

7. The main issue to be decided in this matter is:
 - 7.1 Whether the Respondent is in breach of the Act in that the Respondent acted without authority in authorising payments to attorneys Otto Krause and Associates.
 - 7.2 Whether the Respondent is in breach of the Act in that the Respondent authorised payment to a service provider to cut down and remove trees from the property at a cost of R4 300,00.

JURISDICTION

8. It is convenient to set out the relevant statutory and regulatory provisions governing the application.

9. Section 39 of the Act provides as follows:

An application made in terms of section 38 must include at least one or more of the following orders:

- (1) In respect of financial issues-*
 - (b) an order requiring the association to take action under an insurance policy to recover an amount;*
- (6) In respect of works required to be carried out in private and common areas-*
 - (a) an order requiring an association to have repairs and maintenance carried out;*
- (7) in respect of general and other issues-*
 - (b) any other order proposed by the chief ombud.*

Section 50 of the CSOS Act reads as follows:

“The adjudicator must investigate an application to decide whether it would be appropriate to make an order, and in this process the adjudicator –

- (a) Must observe the principles of due process of law; and*
- (b) Must act quickly, and with as little formality and technicality as is consistent with a proper consideration of the application; and*
- (c) Must consider the relevance of all evidence, but is not obliged to apply the exclusionary rules of evidence as they are applied in civil courts.”*

MAIN APPLICATION

THE APPLICANT

The Applicant made the following submissions, in summary, regarding the complaint for adjudication:

- 10. The Applicant alleged non-compliance with the Act by the two signatories on the Respondents bank account namely Mr Albert Mashoko, the Chairperson and Mr Lazarus Baloyi, the treasurer of the Respondent. It is alleged by the Applicant that the two parties acted without the requisite mandate and authority in that they:

- 10.1 Authorised payments to attorneys Otto Krause and Associates in the amount of R30 000,00 in three tranches of R10 000,00 per month on 8 August 2018, 7 September and 29 September 2017;
- 10.2 These payments the Applicant submits were for services that the owners have no knowledge of and have not authorised in the form of a resolution passed at a formal meeting of all the owners;
- 10.3 That the Respondents upon the request of the owners have refused to divulge any details including providing the Applicant with a copy of the contract between the Respondents and the attorneys Otto Krause and Associates; and
- 10.4 Authorised a tree cutting service to remove trees without first obtaining three quotations causing the Body Corporate to pay the amount R4 300,00 for the services of a tree cutter when they “could have paid less.”

RELIEF SOUGHT

11. The relief and order sought by the Applicant is :

- 11.1 That any further payments to Otto Krause and Associates be ceased with immediate effect;
- 11.2 That Albert Mashoko, Lazarus Baloyi and all other Trustees involved in these unauthorised payments be “fired.”
- 11.3 That all payments made by Albert Mashoko and Lazarus Baloyi to attorneys Otto Krause and Associates be recovered from these Trustees in their personal capacities;
- 11.4 That criminal charges be instituted against Mr Albert Mashoko and Mr Baloyi “if possible.”

THE RESPONDENT'S SUBMISSIONS

Point in Limine

12. The Respondent raised the point in limine that the Applicant has no jurisdiction to lodge a complaint with CSOS and that the adjudicator has no jurisdiction to adjudicate the Applicant's complaint because the Applicant is in arrears with the Applicants levies in the amount of R15 975,04. The adjudicator should therefore dismiss the Applicant's complaint due to lack of jurisdiction.

Main Application

13. The Respondent submitted in summary that the complaint of the Applicant is unfounded in that all of the decisions taken by the Respondent were supported by resolutions taken at a Special General meeting "SGM." The Respondent relied on the minutes of the SGM dated 23 April 2017, the SGM of 28 May 2017 and the minutes of the re-convened SGM dated 8 October 2017 in support of the Respondents submissions.
14. The Respondent submitted that the fees paid to attorneys Otto Krause and Associates were therefore lawfully authorised and that the Respondent instructed this firm of attorneys to represent the Respondent in the High Court with the full knowledge and consent of the owners. The attorneys were instructed to represent the Respondent in a matter in the High Court where specific owners brought an application to the High Court to place the Respondent under administration. This application in the High Court brought by certain owners did not have the support of all the owners, hence the decision by the Respondent to defend the matter in the High Court and to engage the services of an attorney to represent the Respondent.
15. In response to the complaint that the Respondent lacked authority to engage the services of a service provider to cut down and remove trees that had been uprooted, the Respondent disputed that the Respondent acted without such authority. The Respondent submitted that on 31 December 2017, a huge storm uprooted trees in the complex causing the trees to fall on 2 houses and onto a vehicle. Given the time of year the trustees "ran around" to obtain quotations to have the trees removed. The trustees obtained 3 quotations of R15 000,00, R11 000,00 and R4 300,00 respectively. An e-mail was then sent to all the owners on 4 January 2018, including to the Applicant, to have the trees cut down and removed on

5 January 2018. No objections were received from any of the owners, including the Applicant. The Respondent then accepted the lowest quote and authorised the service provider to remove the trees due to the urgency of the matter. Further the lowest quote of R4 300,00 was accepted and the services paid for by the Respondent.

16. The Respondent submits that the Trustees against whom the Applicant has lodged the complaint have been elected lawfully and that there is no justification on the part of the Respondent to ask that criminal charges be laid against these Trustees based on “flimsy” evidence that is not supported by facts.
17. Accordingly, the Respondent asks that the complaint of the Applicant be dismissed.

CONSIDERATION OF THE EVIDENCE

18. The Applicants brought an application for dispute resolution to CSOS of the complaints referred to in 13 above.

Point in Limine – Locus standi in judicio of the Applicant.

19. Section 38(1) of the Act provides as follows:

“Any person may make an application if such person is a party to or affected materially by a dispute.” The Act makes no distinction between applicants who are in arrears and applicants who are not in arrears with their levies.

The principle of locus standi in judicio essentially relates to the right or legal capacity of a party to sue or be sued; In United Watch and Diamond (Pty) Ltd v Disa Hotels Ltd 1972 (4) SA 409 (C) at 415A the court outlined The test for determining this right or legal capacity, stating that:

“to establish that one has locus standi in judicio, one must show,... that he has an interest in the subject matter of the judgment or order sufficiently direct or substantial...”

20. Based on the facts before the adjudicator, the Applicant is an owner and the Applicant is not excluded by Section 38 of the Act to bring the Application. The adjudicator further finds that the Applicant is a party to or materially affected by the dispute. Said differently, on the basis of the papers and the evidence before adjudicator, the Applicant does have the *locus standi in judicio*, to bring the application.

21. I now turn to the main matter. It is common cause that monies were paid by the Respondent to attorneys Otto Krause and Associates. The Applicant alleges that these monies were paid without a mandate from the owners and thus the Respondent acted unlawfully. The Applicant makes this allegation without any evidence in support of the allegation. In fact in the Applicant's own words and handwriting on the complaint form lodged with CSOS, the Applicant states as follows:

"I believe that these payments were made to Otto Krause and Associates to facilitate the representation of certain owners in Dolphin Cove in their case against Propel Sectional Title Solution but I have no concrete evidence to support this."

22. Section 4 of the Act entitled "Powers of the Body Corporate" states as follows:

"The body corporate may exercise its powers conferred on it by or under this Act or the Rules, and such powers include the power to (a) appoint such agents and such employees as the body corporate deems fit."

23. Section 7 of the Act entitled Trustees states follows:

"7(1) The functions and powers of the body corporate must, subject to the provisions of this Act, the rules and any restriction imposed or direction given at a general meeting of the owners of sections, be performed and exercised by the trustees of the body corporate holding office in terms of the rules;

24. Accordingly, based on the Applicants own evidence the adjudicator is not able to make a finding in favour of the Applicant. It follows that the Applicant has not made out a prima facie case against the Respondent to support a finding against the Respondent that monies were paid to attorneys Otto Krause and Associates on the basis as alleged by the Applicant.

25. I now turn to the complaint that the Respondent acted outside of the Respondents mandate when the Respondent paid a third party R4 300,00 to cut and remove a trees from the property.

26. Section 8 of the Act entitled Fiduciary relationship states as follows:

"8(1) Each trustee of a body corporate must stand in a fiduciary relationship to the body corporate. (2)(1) implies that a trustee –

(a) must in relation to the body corporate act honestly and in good faith , and in particular-

(i) exercise his or her powers in terms of this Act in the interest and for the benefit of the body corporate; and

(ii) not act without or exceed those powers.

27. Again the Applicant has led no evidence other than the Applicants “say so” to support a finding against the Respondent. The adjudicator finds that the evidence led by the Respondent has not been refuted. The adjudicator finds that the Respondent acted reasonably within the powers of the Respondent to engage the services of a service provider to cut down and remove the trees that had fallen on 2 houses and onto a vehicle in December 2017. The adjudicator accepts the Respondents explanation that the event occurred in December 2017 and that the matter was urgent. The amount paid for the service of R4 300,00 has not been proven to be either excessive or unreasonable. Accordingly, it is the finding of the adjudicator that the Respondent has not acted outside of its powers as conferred on the Respondent by the Act and there is nothing before the adjudicator to prove that the Respondent at the time did not act in the best interests of the scheme.
28. It follows that the Applicant has not succeeded in the Applicants case against the Respondent and is not entitled to the relief sought.
29. It has not escaped the adjudicator that there are very real divisions within the owners in the scheme that has resulted in a matter currently before the High Court. It is for the High Court to get to the heart of the matter before it.

ORDER

30. Accordingly, I make the following order:
 - (i) The Complaint of the Applicant against the Respondent is dismissed.
 - (ii) There is no order as to costs.
31. The party’s attention is drawn to the following sections of the Act:

Section 56 (1) –

“If an adjudicators order iswithin the jurisdiction of the Magistrates Court, the order must be enforced as if it were a judgment of such Court....”

Section 56(2) –

“If an adjudicator’s order isbeyond the jurisdiction of the Magistrates Court, the order must be enforced as if it were a judgment of the High Court....”

Section 57 (1)-

“If an Applicant or the association or any affected person who is dissatisfied by an adjudicator’s order, may appeal to the High Court, but only on a question of law.

SIGNED AND DATED ON THIS 31th DAY OF JULY 2018.

A handwritten signature in black ink, appearing to read 'P A Beck', written in a cursive style.

P A BECK
ADJUDICATOR